

WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2024

S.E.M.C.C. File Number: 02-24-2024

**IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)**

B E T W E E N:

VICTORY MOTORS (ABBOTSFORD) LTD. and JANSEN INDUSTRIES 2010 LTD.

APPELLANTS

- and -

ACTTON SUPER-SAVE GAS STATIONS LTD.

RESPONDENT

**FACTUM OF THE RESPONDENT
ACTTON SUPER-SAVE GAS STATIONS LTD.**

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2024

TEAM # 2024-03

**TO: THE REGISTRAR OF THE
SUPREME ENVIRONMENTAL MOOT COURT OF CANADA**

AND TO: ALL REGISTERED TEAMS

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 This appeal concerns the fair and just allocation of liability for costs incurred during the remediation of contaminated sites. The two pieces of governing legislation are the *Environmental Management Act*, SBC 2003, c 53 (“*EMA*”) and the *Contaminated Sites Regulation*, BC Reg 375/96 (“*CSR*”).

Environmental Management Act, SBC 2003, c 53 [*EMA*].

Contaminated Sites Regulation, BC Reg 375/96 [*CSR*].

2 There are two issues on appeal. The first issue questions whether a court may consider the benefit derived from obtaining a Certificate of Compliance (“*CoC*”) when apportioning liability for the cost of remediating a contaminated site under the *EMA*. The second issue questions which type of legal costs associated with remediation are recoverable under the *EMA*, and by whom.

3 The Respondent answers the first issue in the affirmative. Obtaining a *CoC* provides current and future owners of remediated land with several potential benefits. Such benefits include increased property value, exemption from liability to remediate the same site in the future, and assurance that they will bear no responsibility for further remediation costs. Courts have broad discretion to consider factors that allow for a fair allocation of reasonably incurred remediation costs. Considering the *CoC* to be a benefit to a responsible party that contributed to the contamination addresses the fairness concerns that may arise when applying the polluter pays principle in practice.

4 Regarding the second issue, the Respondent submits that only reasonably incurred legal costs related to remediation are recoverable under the *EMA*. Legal costs related to litigation are recoverable under the *Supreme Court Civil Rules* (“*Rules*”). Recovery of both remediation and litigation legal costs under the *EMA* would: (a) render the *Rules* redundant, (b) create problems when cost recovery cases under the *EMA* are heard before the Provincial Court of British Columbia (“*BCPC*”), (c) and diverge from other statutes that have drawn distinctions between the type of costs recoverable under the statute at issue and the *Rules*.

Supreme Court Civil Rules, BC Reg 168/2009 [Rules].

5 Furthermore, the recovery of reasonably incurred remediation costs under the *EMA* should be open to any person, not solely to a “responsible person.” Preventing innocent persons who were involved in the remediation efforts from recovering their remediation costs is illogical, inconsistent with the *EMA*’s legislative scheme, and deviates from the *EMA*’s purpose of encouraging timely remediation.

6 Finally, the Appellants request an order permitting them to present evidence on remediation legal costs if this matter is remitted back to trial. The Respondent submits that this request be dismissed, as the Appellants have previously failed to adduce evidence related to their costs when granted the opportunity at trial.

B. Statement of Facts

7 The Respondent accepts the facts presented in the Appellants' factum. Here, the Respondent will further elaborate on the parties and procedural history for increased clarity.

(i) The Parties

8 The Appellants, Victory Motors (Abbotsford) Ltd. (“**VM**”) and Jansen Industries 2010 Ltd. (“**Jansen**”), are the respective owners of contaminated sites in Abbotsford, British Columbia.

9 Jansen owns two contiguous parcels of land with commercial-use buildings at 33261 South Fraser Way and 33264 Old Yale Road (together, the “**Jansen site**”) (*VM BCSC*). Jansen purchased these parcels between 1991 and 1992 (*VM BCSC*).

Jansen Industries 2010 Ltd v Victory Motors (Abbotsford) Ltd, 2019 BCSC 1621 at paras 6, 17 [VM BCSC].

10 VM has owned land that previously housed a gas station at 33258 South Fraser Way (the “**VM site**”) since 1948. The land has a commercial building leased to tenants (*VM BCSC*).

VM BCSC, supra para 9 at para 6.

11 The Respondent, Acton Super-Save Gas Stations Ltd. (“**Super-Save**”) operated the VM site gas station from 1982 to 1992 (*VM BCSC*).

VM BCSC, supra para 9 at para 16.

(ii) Background

12 Many gasoline distributors operated a gas station on the VM site from the 1940s until 1994, including VM and the Respondent. When the gasoline service stopped, VM failed to empty or decommission five buried gasoline storage tanks (*VM BCSC*).

VM BCSC, supra para 9 at para 16.

13 In or around 2010, both the Jansen site and the VM site were found to be contaminated sites pursuant to the *EMA* (*VM BCSC*). The hydrocarbon contamination originated from the VM site and migrated to the Jansen site over the years (*VM BCSC*).

VM BCSC, supra para 9 at paras 7, 15.

14 On August 2, 1011, Jansen brought an action against VM (the “**Jansen Action**”) (*VM BCSC*). In 2012, the Jansen family incorporated Victory Motors Ltd. (“**Victory Ltd.**”), which subsequently purchased all the shares of VM (*VM BCSC*). Jansen agreed to indemnify the former shareholder against any environmental claims arising from the VM site contamination (*VM BCSC*).

VM BCSC, supra para 9 at paras 22—24.

15 On October 31, 2012, VM commenced an action against all previous gasoline distributors on the VM site for historic and continuous contamination (the “**VM Action**”) (*VM BCCA*). Around the same time, VM renovated buildings on the VM site and subsequently fully leased the property to tenants (*VM BCCA*).

Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Stations Ltd, 2021 BCCA 129 at para 9 [*VM BCCA*].

16 In 2016, Jansen and VM settled with two defendant gasoline distributors in the VM Action (*VM BCSC*). As part of their settlement agreement, the defendant gasoline distributors’ liability to obtain CoCs for the affected sites was limited to an undisclosed amount (*VM BCCA*).

VM BCSC, supra para 9 at para 26.

VM BCCA, supra para 15 at para 16.

17 The Appellants hired Levelton Engineering Consultants Ltd. (“**Levelton**”) to remediate the VM site and the Jansen site (*VM BCCA*). Each site obtained a CoC in 2018. The CoCs allowed the contaminated soil to remain underground. The CoCs also imposed limitations on the land, namely that the lands’ commercial use be maintained, and that any new structure has a basement of no more than two meters below the grade as it existed in October 2017 (*VM BCCA*). The Appellants incurred \$259,218 to remediate the VM site and \$136,488 to remediate the Jansen site (together, the “**Levelton costs**”) (*VM BCCA*).

VM BCCA, *supra* para 15 at paras 10—12.

(iii) Supreme Court of British Columbia Decision

18 In the trial decision, *Jansen Industries 2010 Ltd v Victory Motors (Abbotsford) Ltd*, 2019 BCSC 1621 (“**VM BCSC**”), VM and Jansen sought recovery of (a) the Levelton costs, and (b) their legal costs associated with pursuing other responsible parties for their remediation costs (*VM BCCA*). VM alone sought costs for matters not relevant to this appeal (*VM BCCA*).

VM BCSC, *supra* para 9 at paras 34—35, 50.

19 The trial judge ruled on two matters relevant to this appeal: (a) whether a CoC may be considered when apportioning liability under the *EMA*, and (b) whether legal costs are recoverable under the *EMA* and which parties may recover.

20 When apportioning liability for costs of remediation, the Court turned to s 47(5) of the *EMA*, which allows “responsible persons” to recover reasonably incurred remediation costs from other responsible persons (*VM BCCA*). The Court applied factors (a)—(f) of s 35(2) of the *CSR* to allocate responsibility for remediating the VM site and the Jansen site (*VM BCCA*).

VM BCCA, *supra* para 15 at paras 32—33.

21 The Court found that the price paid by Victory Ltd. to purchase VM’s shares was not relevant under s 35(2)(a): “the price paid for the property by the person seeking cost recovery” (*VM BCSC*). Further, the Court found that any increase in the VM site’s property value was attributable to factors not dependent on the remediation, including the building renovations and rental income (*VM BCSC*). VM did not receive a “windfall” by remediating the VM site (*VM BCSC*).

VM BCSC, supra para 9 at paras 110, 112, 116.

22 Under s 35(2)(f), “other factors relevant to a fair and just allocation,” the Court considered that VM is “receiving the benefit of remediation costs while being a significant contributor to the contamination” (*VM BCSC*). The Court allocated a significant amount of the remediation costs to VM based on the finding that VM received the benefits of the CoC (*VM BCSC*).

VM BCSC, supra 9 at paras 148.

23 VM was found responsible for 45% of the remediation costs for the VM site and 30% for the Jansen site (*VM BCSC*). Super-Save was found responsible for 35% of the remediation costs for the VM site and 50% for the Jansen site (*VM BCSC*).

VM BCSC, supra 9 at paras 153, 166.

24 When evaluating whether legal costs were available and to which parties, Jansen was found to not meet the definition of “responsible party” under the *EMA* (*VM BCSC*). Therefore, Jansen was precluded from recovering legal costs under s 47(3)(c) (*VM BCSC*).

VM BCSC, supra para 9 at para 59.

25 In contrast, VM was found to be a responsible person under the *EMA* and hence eligible to recover legal costs (*VM BCSC, EMA*). However, VM’s claim for legal costs was denied as VM failed to present evidence regarding “the quantum or nature of [legal] services being claimed” (*VM BCSC*).

VM BCSC, supra para 9 at paras 64—65, 103.

EMA, supra para 1, s 47(5).

26 The trial judge awarded the Appellants only the Levelton costs and dismissed other claims for recovery (*VM BCSC*).

VM BCSC, supra para 9 at para 101.

(iv) Court of Appeal of British Columbia Decision

27 On appeal in *Victory Motors (Abbotsford) Ltd v Acton Super-Save Gas Stations Ltd*, 2021 BCCA 129 (“*VM BCCA*”), the VM and Jansen argued that the trial judge erred by (a) considering

the CoC to be a “benefit” when apportioning liability among responsible persons, and (b) refusing to award legal costs as costs of remediation based on a lack of evidence (*VM BCCA*).

VM BCCA, *supra* para 15 at paras 52—54.

28 On the first issue, the Court of Appeal of British Columbia (“**BCCA**”) found that the trial judge erred by considering the benefit of the CoC when allocating responsibility for remediation costs (*VM BCCA*). The BCCA found that considering the CoC to be a benefit does not align with the *EMA*’s objective of encouraging timely clean-up of contaminated sites (*VM BCCA*). Further, the BCCA found that the trial judge in fact considered the share purchase price under s 35(2)(f) of the *CSR* when allocating liability, even though he initially declined to do so under s 35(2)(a) (*VM BCCA*).

VM BCCA, *supra* para 15 at paras 56—60.

29 On the second issue, the BCCA distinguished between “remediation legal costs” and “litigation legal costs” under s 47 of the *EMA* (*VM BCCA*). The Court determined that only remediation legal costs are available through the statute, and that litigation legal costs are available through the *Rules* (*VM BCCA*). The BCCA also determined that innocent owners could recover their reasonably incurred remediation costs as “responsible persons” without liability (*VM BCCA*). This finding would allow Jansen to recover its legal costs alongside VM. However, the BCCA upheld the trial judge’s decision that there was insufficient evidence for the parties to recover their costs and dismissed this issue (*VM BCCA*).

VM BCCA, *supra* para 15 at paras 104, 128—130, 144—145.

PART II -- ISSUES ON APPEAL

30 The Respondent agrees with the two central issues raised by the Appellants. The issues are reproduced here for convenience:

(1) whether a court may take into account the benefit enjoyed by a party in obtaining a CoC when apportioning liability for the costs of remediating a contaminated site among responsible persons under the *EMA* (the “**Benefit Issue**”); and

(2) whether legal costs associated with remediation or with pursuing litigation are recoverable under the *EMA*, and whether the answer differs depending upon whether the person seeking cost recovery is a “responsible person” under the *EMA*, s 47(1), or “any person” under the *EMA*, s 47(5) (the “**Costs Issue**”).

31 Contrary to the Appellants’ submissions, the Respondent submits that these questions concern both the VM site and the Jansen site.

PART III -- ARGUMENT

A. Request for Dismissal of Appellants’ Extraneous Submissions

32 The Respondent will briefly consider the Appellants’ arguments outside of the two central issues on appeal. The Respondent requests that the Supreme Environmental Moot Court of Canada (“**SEMCC**”) dismiss each of the following submissions from the Appellant as irrelevant to this appeal.

(i) The Appellants’ Submission that the term “Benefit” was not Sufficiently Explained

33 The Appellants submit that both the Supreme Court of British Columbia (“**BCSC**”) and BCCA erred by not explaining how a court should consider a “benefit” when apportioning liability under the *EMA*. The Respondent disagrees with the Appellants and submits that the apportionment exercise under s 35(2) of the *CSR* is done on a case-by-case basis. Therefore, the consideration of any “benefits” is contextual. The Court in *Gehring et al v Chevron Canada Limited et al*, 2006 BCSC 1639 (“**Gehring**”) notes that “[t]here is no precise formula for allocating responsibility among the ‘responsible persons.’” Rather, the trial court weighs how each factor affects a party’s liability based on the facts. Neither the BCSC nor the BCCA erred by failing to instruct how trial courts should weigh specific s 35(2) factors when apportioning liability.

Gehring et al v Chevron Canada Limited et al, 2006 BCSC 1639 at para 134 [*Gehring*].

(ii) The Appellants’ Submission for the SEMCC to Settle the Law on Betterment

34 The Appellants request the SEMCC to settle the law on the consideration of betterment when apportioning remediation costs. With respect, betterment is not at issue in this appeal as

neither the VM site nor the Jansen site was bettered (*VM BCCA*, *VM BCSC*). Rather, each CoC allows for contamination to remain in the soil (*VM BCCA*). Both *VM BCSC* and *VM BCCA* found that the land value was not increased beyond the costs of remediation. Accordingly, this appeal does not present the factual basis to settle the law on betterment.

VM BCCA, *supra* para 15 at paras 11, 68.

VM BCSC, *supra* para 9 at para 112.

B. Standard of Review

35 Both the Benefit Issue and Costs Issue are questions of law. The standard of review is correctness (*Housen*).

Housen v Nikolaisen, 2002 SCC 33 at para 8 [*Housen*].

C. The Purpose and Structure of the *EMA* and *CSR*

36 The Respondent will briefly describe the *EMA* and *CSR* legislative scheme to provide context for the Benefit Issue and the Costs Issue.

37 The *EMA* and *CSR* together provide a scheme to hold polluters liable for environmental contamination, even if that pollution was allowable when it occurred (for instance, prior to environmental legislation coming into force) (*Seabright*). The *EMA* encourages timely remediation of contaminated sites and aims to deter and prevent pollution (*Seabright*).

Seabright Holdings Ltd v Imperial Oil Ltd, 2003 BCCA 57 at paras 31—32 [*Seabright*].

38 When performing statutory interpretation, a court must consider the statute's text, context, and purpose (*Rizzo*). The courts have found that the *EMA*'s central purpose is to uphold the "polluter pays principle" (*Workshop*), which means that those who pollute should bear the costs of their pollution (*Schwartz*). This principle is embedded in federal and provincial environmental statutes (*Imperial*).

Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27 at para 21 [*Rizzo*].

Workshop Holdings v CAE Machinery Ltd, 2003 BCCA 56 at para 41 [*Workshop*].

Priscilla Schwartz, “The polluter-pays principle” in Malgosia Fitzmaurice, David M Ong & Panos Markouris, eds, *Research Handbook on International Environmental Law*, 2nd ed (Cheltenham: Edward Elgar Publishing, 2010) 243 at 244.

Imperial Oil Ltd v Quebec (Minister of the Environment), 2003 SCC 58 at para 23 [*Imperial*].

39 The *EMA* implements the polluter pays principle by identifying polluters and holding them absolutely, retroactively and jointly and separately liable for reasonably incurred costs of remediation under s 47. Section 48 of the *EMA* authorizes a director to order a responsible party to remediate a site. Parties may also choose to enter a voluntary remediation agreement pursuant to s 51 or remediate independently under s 54. A director may issue a CoC once remediation is complete under s 53(3). Section 47(9) of the *EMA* grants the court authority to allocate costs among those responsible for remediation (*J.I. Properties*). Overall, the *EMA* provides for a “remediate first, allocate responsibility later” approach where the costs of remediation may be recovered once remediation is complete (*VM BCCA*).

EMA, *supra* para 1, ss 45, 47—48, 51, 53—54.

J.I. Properties Inc v PPG Architectural Coatings Canada Ltd, 2015 BCCA 472 at para 39 [*J.I. Properties*].

VM BCCA, *supra* para 15 at para 134.

40 When allocating liability, the court may exercise discretion under the guidance of s 35(2) factors (a)—(f) of the *CSR*. Together, these sections support the court in making a fair and just allocation of reasonably incurred remediation costs (*J.I. Properties*).

CSR, *supra* para 1, s 35(2).

J.I. Properties, *supra* para 39 at paras 62—64.

D. The Benefit of Obtaining a CoC May Be Considered When Apportioning Liability

(i) Overview of the Respondent’s Position

41 The benefit of a CoC may be considered when apportioning liability for reasonably incurred costs of remediation. This consideration does not contravene the polluter pays principle or the *EMA*’s legislative scheme. Further, the CoC should not be narrowly construed as only providing a benefit to landowners through increased land value. The CoC provides landowners

with other benefits, including certainty for current and future owners, that may properly factor into the apportionment of liability under s 35(2)(f) of the *CSR*.

42 Therefore, the Respondent submits that the BCCA erred in reversing the BCSC's ruling. The BCSC correctly considered the benefits of the CoC to VM, a past polluter and current owner, and accordingly allocated VM a higher proportion of liability for the VM site.

(ii) Allocating Liability for Remediation Costs under s 35(2) of the *CSR*

43 Contrary to the Appellants' submission, the language in s 35(2) of the *CSR* indicates that a court must consider the factors contained therein when apportioning liability for the cost of remediation between responsible parties (*VM BCSC*, *VM BCCA*):

In an action between 2 or more responsible persons under section 47 (5) of the [*EMA*], the following factors must be considered when determining the reasonably incurred costs of remediation. (emphasis added)

CSR, *supra* para 1, s 35(2).

VM BCSC, *supra* para 9 at para 105.

VM BCCA, *supra* para 15 at para 29.

44 Section 35(2)(f) of the *CSR* provides the court with broad discretion to consider “other factors relevant to a fair and just allocation” when apportioning liability for remediation costs. The courts have found that other relevant factors include a responsible person's failure to take steps after they discovered a contamination source (*Honing*), and concerns that a responsible person will pay remediation costs twice (*Tanex*). These cases suggest that the court has broad latitude to determine what factors are relevant when apportioning liability. Depending on the facts of the case, a court may find it relevant to weigh the benefit of a CoC to a responsible person and apportion liability accordingly.

CSR, *supra* para 1, s 35(2)(f).

Honing v Phinney, 2018 BCSC 702 at para 106 [*Honing*].

Tanex Industries Ltd v Greater Vancouver Water District, 2019 BCSC 74 at para 58 [*Tanex*].

45 Concerns may arise that reading s 35(2)(f) as providing the courts with discretion to address any factors they see fit when apportioning liability will lead to all CoC holders being

apportioned increased liability, simply by virtue of holding a CoC. However, parties must submit relevant evidence for a court to consider s 35(2) factors when apportioning liability. For instance, in *Livco Developments v Dworschak*, 2019 BCPC 45 (“*Livco*”), no relevant evidence was provided regarding the s 35(2) factors. Due to this lack of evidence, the Court apportioned liability equally between the two responsible persons (*Livco*). This demonstrates that a court will only consider s 35(2) factors when relevant evidence is submitted.

Livco Developments v Dworschak, 2019 BCPC 45 at 21 [*Livco*].

(iii) The CoC Presents Benefits to Holders Beyond Increased Land Value

46 The Respondent submits that the BCCA erred by narrowly considering the CoC’s benefit only in terms of raising a remediated site’s property value (*VM BCCA*). A CoC provides owners of remediated land with benefits outside of the possibility of increasing property values. A CoC provides assurance to present and future owners of remediated land that their liability in relation to past contamination is limited.

VM BCCA, *supra* para 15 at paras 66—67.

47 A CoC is issued by a director under s 53(3) of the *EMA* once a contaminated site has been remediated in accordance with numerical or risk-based standards. Both standards are permanent remediation solutions (*Burnaby*).

EMA, *supra* para 1, s 53(3).

City of Burnaby v Director, Environmental Management Act, 2018 BCEAB 17 at para 229 [*Burnaby*].

48 In cases where “windfall” gains in property value result from remediation and obtaining a CoC, it is clear that a benefit exists for landowners that should be considered when apportioning liability. If the property value is increased in excess of remediation expenses, the person who purchased the land and knew it was contaminated should bear those costs (*J.I. Properties*). However, both *VM BCSC* and *VM BCCA* acknowledge that there was no windfall for VM on the facts (*VM BCSC*, *VM BCCA*).

J.I. Properties, *supra* para 39 at para 192.

VM BCSC, *supra* para 9 at paras 112, 166.

VM BCCA, supra para 15 at paras 59, 67—68.

49 The Respondent submits that a CoC provides additional benefits beyond increased land value. The CoC shields holders from future liability under the *EMA*. Section 46(1)(m), the “CoC Exemption,” applies to owners of remediated sites to exempt them from responsibility to remediate the same site in the future (*J.I. Properties*). For instance, a landowner who obtained a CoC may sell their land to a person who wants to use the remediated site for a new purpose that requires additional remediation. The seller would not bear any liability for additional remediation, as the CoC Exemption exempts the seller from “responsible person” status under the *EMA* (*Beacon*).

J.I. Properties, supra para 39 at para 3.

Beacon Pacific Properties Ltd v Director, Environmental Management Act, 2022 BCEAB 12 at para 10 [*Beacon*].

50 The *EMA* uniquely provides the CoC Exemption. In *J.I. Properties Inc v PPG Architectural Coatings Canada Ltd*, 2015 BCCA 472 (“**J.I. Properties**”), an owner of a contaminated site received a “comfort letter” from the Ministry stating that the owner had remediated the land. However, environmental legislation had not come into force when the letter was provided to the owner (*J.I. Properties*). The letter was not found to be equivalent to a CoC, and therefore the owner was not exempt from liability under s 46(1)(m) of the *EMA* (*J.I. Properties*). This demonstrates how the CoC is distinct in providing holders with benefits that they cannot obtain another way. A responsible person may contract with others to limit liability once remediation is complete. However, unlike a contract, s 46(1)(m) does not require the consent of other parties to exempt CoC holders from liability.

J.I. Properties, supra para 39 at paras 15—18, 50—55.

51 Other documents under the *EMA* have been considered a benefit to owners of contaminated land, which suggests that a CoC is similarly beneficial. In *Seaspan ULC v North Vancouver (District)*, 2022 BCCA 433 (“**Seaspan**”), the director of waste management issued a remediation order naming two responsible parties under s 53 of the *EMA*. In *Seaspan*, the Court found that a remediation order runs with the land and benefits any potential purchaser of the land. This is because the remediation order names the parties responsible for remediation, thus ensuring that a future purchaser is not responsible for remediation costs (*Seaspan*).

Seaspan ULC v North Vancouver (District), 2022 BCCA 433 at paras 9, 47—48 [*Seaspan*].

52 To analogize from *Seaspan*, CoC provides a similar benefit to future purchasers by providing them assurance that satisfactory remediation is complete. Unless the purchaser wishes to change the use of the land, the CoC assures the purchaser that they will not be liable for remediation costs. Remediation can be a lengthy and expensive process, and future purchasers may be willing to pay more for remediated land if they are assured that they will not incur remediation costs after purchasing the land. A CoC may also make the potential purchaser’s due diligence easier and cheaper. Further, a CoC is generally required to change the land’s zoning and for approval of a subdivision plan (*J.I. Properties*).

Seaspan, supra para 52 at para 55.

J.I. Properties, supra para 39 at para 30.

(iv) The CoC is a Benefit for VM that Should Increase Its Liability

53 VM benefitted from obtaining the CoC, and the trial judge correctly factored this consideration into s 35(2)(f) of the *EMA* when allocating liability for the costs of remediation. This finding does not detract from the *EMA*’s legislative scheme or the polluter pays principle.

54 Section 35(2)(f) of the *EMA* is concerned with fairness. It is flexible and gives a trial judge discretion to consider factors that allow for a fair allocation of reasonably incurred remediation costs. In this case, the trial judge found that neither the VM site nor the Jansen site increased in value following remediation (*VM BCSC*, *VM BCCA*). The trial judge explicitly rejected the argument that VM received a “windfall” and that the “windfall” argument affected the apportionment decision (*VM BCSC*). However, the BCCA disagreed with the trial judge’s statement and instead held that the purchase price of VM’s shares did, in fact, influence the trial judge’s apportionment decision (*VM BCCA*).

VM BCSC, supra para 9 at paras 99, 148.

VM BCCA, supra para 15 at para 67.

55 Respectfully, the Respondent disagrees with the BCCA's characterization of the BCSC's decision. The Respondent submits that the general benefits VM received from the CoC on its own property were what led the BCSC to find VM more liable for remediation costs on the VM site.

56 The trial judge properly exercised his discretion under s 35(2)(f) of the *EMA* and found "it relevant that [VM] is receiving the benefit of the remediation costs while being a significant contributor to the contamination" (*VM BCSC*). On this basis, the trial judge allocated VM a greater share of the remediation costs.

VM BCSC, supra para 9 at para 148.

57 In *J.I. Properties*, the Court stated that s 46(1)(m) of the *EMA* simply defines whether a person is responsible for remediation costs, not the extent of the person's liability. However, *J.I. Properties* is distinguishable from our current case in two aspects: first, the landowner in *J.I. Properties* knowingly purchased contaminated land and did not contribute to the contamination. Second, the landowner in *J.I. Properties* did not qualify for the s 46(1)(m) exemption, thus the Court's comments did not apply to the case at hand (*J.I. Properties*). In this appeal, VM did not simply purchase the previously contaminated land; VM contributed to the pollution. The Respondent submits that the s 46(1)(m) CoC Exemption can factor into VM's liability under s 35(2)(f) of the *CSR*.

J.I. Properties, supra para 39 at paras 7—8, 53, 59, 73.

VM BCSC, supra para 9 at para 15.

58 The BCCA is concerned that if the court finds the CoC to be a benefit that increases liability for remediation costs, owners of contaminated sites will be disincentivized to remediate them in a timely manner (*VM BCCA*). Respectfully, the Respondent submits that this concern is overstated. Section 48(1) of the *EMA* contains an enforcement mechanism whereby a director may order a party to undertake remediation. A director may require a responsible person to undertake remediation, contribute monetarily or in kind to another person's remediation efforts, or provide security including real and personal property. In addition, the *EMA* holds all responsible persons jointly and separately liable for reasonable remediation costs, allowing the responsible person who

undertook remediation to recover from other responsible persons. This scheme is not affected by considering the CoC to be a benefit when allocating liability.

VM BCCA, *supra* para 15 at para 56.

EMA, *supra* para 1, ss 48(1)—(2).

59 When allocating liability under s 35(2)(f) of the *CSR*, the court’s role is to uphold the polluter pays principle while ensuring fairness to all parties. Considering the CoC to be a benefit to a responsible party that contributed to the contamination can help address the fairness concerns that arise when applying the polluter pays principle in practice.

CSR, *supra* para 1, s 35(2)(f).

E. “Any Person” May Recover Reasonable Remediation Costs Under the *EMA*, and Litigation Legal Costs Under the *Rules of Court*

(i) Overview of the Respondent’s Position

60 Any person, not just a responsible person, may recover their incurred remediation legal costs under the *EMA*, subject to reasonableness. Any litigation legal costs incurred in seeking contribution from responsible persons may be recovered under the *Rules* rather than directly through the *EMA*.

61 The Respondent agrees with the Appellants’ submission that the BCCA correctly distinguished between remediation legal costs and litigation legal costs under s 47(3)(c) of the *EMA*. This distinction prevents redundancies with the *Rules* while not offending the polluter pays principle.

62 The Respondent requests that this Court narrow the BCCA’s interpretation of remediation legal costs to ensure that litigation legal costs are kept firmly separate from remediation legal costs.

(ii) Distinction Between Remediation Legal Costs and Litigation Legal Costs

63 It could be argued that a plain reading of s 47(1) and (3) of the *EMA* would suggest that all costs incurred during remediation are recoverable under the *EMA* (*VM BCCA*). However, this interpretation is incorrect because:

- (a) broadly interpreting this section would make the *Rules* redundant (*VM BCCA*);
- (b) problems will arise when cost recovery cases under the *EMA* are heard before the BCPC (*Livco*); and
- (c) other statutes have drawn distinctions between the type of costs recoverable under the statute at issue and the *Rules* (*Century*).

Therefore, it is correct to interpret s 47 of the *EMA* as only including remediation legal costs. Parties may still recover their litigation legal costs; however, they will be assessed under the *Rules*, rather than the *EMA*.

VM BCCA, *supra* para 15 at paras 92—94, 100—102, 105—107.

Livco, *supra* para 45 at para 23.

Century Group GP Co Ltd v KRS Excavating Ltd, 2022 BCSC 357 at paras 57—63 [*Century*].

64 Section 47 of the *EMA* creates a mechanism for persons who have incurred remediation costs to recover those costs from responsible persons. What constitutes “costs of remediation” is at issue in this appeal.

EMA, *supra* para 1, s 47.

65 Section 47(3) defines “costs of remediation” as “all costs of remediation... without limitation,” (emphasis added) and s 47(3)(c) specifically includes “legal and consultant costs associated with seeking contributions from other responsible persons.”

EMA, *supra* para 1, s 47(3).

66 The Respondent submits that, first, including all legal costs, including the subset of litigation legal costs, under the *EMA* would lead to a redundancy of rules covering litigation legal costs. In *VM BCCA*, the Court explained that remediation legal costs must be covered “in both the general words of ss. 47(1) and (3) and the specific words of s. 47(3)(c).” The *BCCA* further noted that:

Section 47(3)(c) legal costs must be of the sort I have described, because if they were to be characterized only as litigation legal costs between responsible persons, the section would be redundant of the *Supreme Court Civil Rules* costs rules. (emphasis added)

VM BCCA, *supra* para 15 at paras 100—101.

67 The Court in *VM BCCA* adds that if both litigation legal costs and remediation legal costs are included under the *EMA*, Rule 14-1 of the *Rules* which governs party-and-party costs would be rendered redundant (*VM BCCA*). The Court’s interpretation respects the wording of s 47(3)(c) of the *EMA* while recognizing the importance of the *Rules* for recovering party-and-party costs. A party may still recover litigation legal costs in accordance with the *Rules*. Remediation legal costs are recoverable under the *EMA* (*VM BCCA*).

VM BCCA, *supra* para 15 at paras 102-104.

68 The Court in *Canadian National Railway Co v A.B.C. Recycling Ltd*, 2006 BCCA 429 (“*CNR BCCA*”) interpreted the costs regime distinction in the *EMA*’s predecessor legislation, the *Waste Management Act*, RSBC 1996, c 482, s 27 (“*WMA*”). Section 27 of the *WMA* is now s 47 of the *EMA*. The Court in *CNR BCCA* found that the legislation only contemplates the costs of remediation, and that there is no basis to derive “any legislative intent to provide for the special costs of litigation.” This aligns with the *VM BCCA*’s interpretation.

Canadian National Railway Co v A.B.C. Recycling Ltd, 2006 BCCA 429 at paras 10—11 [*CNR BCCA*].

Waste Management Act, RSBC 1996, c 482, s 27.

69 Legal counsel may be concerned that the requirement to provide evidence distinguishing between remediation legal costs and litigation legal costs will require waiving solicitor-client privilege. However, *VM BCCA* explained that counsel can avoid this concern by “setting up distinct files and time-keeping protocols to maintain the distinction.” This does not present an undue burden for lawyers. To recover under the *EMA*, parties already must prove the reasonableness of their remediation costs, which requires a level of disclosure regarding these costs (*EMA*, *CSR*). Concerns around the possibility of disclosing privileged information are therefore overstated.

VM BCCA, *supra* para 15 at para 103.

EMA, *supra* para 1, s 47(1).

CSR, *supra* para 1, s 35(2).

70 Second, to extrapolate the Court’s findings in *VM BCCA*, preventing litigation cost recovery under the *EMA* avoids problems when cases are heard at the BCPC rather than at the BCSC. The Court in *Livco* noted that if litigation legal costs are claimed under s 47(3)(c) of the *EMA*, this creates an “apparent conflict” with the *Small Claims Act*, RSBC 1996, c 430 (“*SCA*”). Section 19(4) of the *SCA* provides that the BCPC cannot direct one party to pay another party’s counsel or solicitor’s fees.

Livco, *supra* para 45 at para 23.

Small Claims Act, RSBC 1996, c 430, s 19(4) [*SCA*].

71 Given that claims for cost recovery under the *EMA* may occur at the BCPC, the BCCA was correct in refusing to include litigation legal costs as recoverable under the *EMA* directly.

72 Third, other case law has held that litigation legal costs are recoverable under the *Rules* and not under the statute at issue. The following cases demonstrate that there does not need to be explicit wording in the legislation for a court to limit what costs are recoverable under the statute.

73 The Court in *Century Group GP Co Ltd v KRS Excavating Ltd*, 2022 BCSC 357 (“*Century*”) used *VM BCCA*’s analysis to find a similar distinction between “lien investigation and removal costs” and “lien litigation legal costs” under the *Builders Lien Act*, SBC 1997, c 45 (“*BLA*”). Section 19 of the *BLA* provides that a person who wrongfully filed a lien is liable for “costs and damages” incurred by the owner as a result of the wrongful filing. This wording is similarly broad to s 47(3)(c) of the *EMA*’s wording of “legal and consultant costs.” The *BLA* does not indicate that there is a distinction between “investigation and removal costs” and “litigation legal costs” (*Century*). However, the Court in *Century* agreed with *VM BCCA*’s ruling that an assessment and award of litigation costs should occur under the *Rules* rather than the statute. Particularly because:

[i]t would make no sense to use a statutory provision bearing on a very particular set of tasks to assess costs in relation to a wider and more general set of tasks, when the *Rules* already furnish a fine-tuned toolset with which to do so.

Century, *supra* para 63 at paras 57—63.

Builders Lien Act, SBC 1997, c 45, s 19 [BLA].

EMA, *supra* para 1, s 47(3)(c).

74 As a counterpoint, the Court in *The Owners, Strata Plan KAS 2428 v Baettig*, 1027 BCCA 377 (“*Baettig*”) found that the phrase “reasonable legal costs” covered both legal costs of enforcing a lien and party-and-party costs under the *Strata Property Act*, SBC 1998, c 43, s 118 (“*SPA*”). However, this case is distinguishable from the *EMA*. The *SPA*’s predecessor legislation explicitly included both “the legal and administrative costs of filing” a lien and “the legal costs of a proceeding” as recoverable costs (*Baettig*). Section 118 of the *SPA* removed this distinction between each type of legal costs by only using the phrase “reasonable legal costs” (*Baettig*). The *EMA*’s predecessor legislation did not distinguish between types of costs, which suggests that there is no legislative intent to include both remediation legal costs and remediation legal costs, unlike in the *SPA*.

The Owners, Strata Plan KAS 2428 v Baettig, 1027 BCCA 377 at paras 46, 49—50, 73—74 [*Baettig*]

Strata Property Act, SBC 1998, c 43, s 118 [*SPA*].

75 *Century* and *Baettig* support the Respondent’s position that the *Rules* are best suited to handle litigation legal costs and that the *EMA* is suited to awarding remediation legal costs.

(iii) The Scope of Remediation Legal Costs Should be Clarified

76 The Respondent agrees with *VM BCCA* that litigation legal costs should be recovered through the *Rules* and not the *EMA*. However, *VM BCCA* has outlined a broad set of tasks under “remediation legal costs” that the Respondent submits are better captured under litigation legal costs. The Respondent asks that the SEMCC clarify what costs are recoverable under the *EMA* to better recognize the distinction between remediation legal costs and litigation legal costs.

77 For instance, *VM BCCA* states that costs associated with negotiating with responsible persons may be recoverable as remediation legal costs. The Respondent submits that negotiations more closely resemble litigation legal costs compared to remediation legal costs, because Appendix B of the *Rules* provides for recovery of negotiation costs. Further, the courts have expressed that separating which costs are available under the *Rules* and which costs are available

under the statute is challenging (*Century*). Guidance from the court will aid counsel in delineating between the two types of costs in an *EMA* cost recovery action.

VM BCCA, *supra* para 15 at para 99.

Rules, *supra* para 4 at Appendix B, no. 44.

Century, *supra* para 73 at paras 65—70.

(iv) “Any Person” May Recover Reasonable Remediation Legal Costs under the *EMA*

78 Section 47(5) of the *EMA* states that “any person” may recover their reasonably incurred costs of remediation from one or more responsible persons. However, the issue of whether only “responsible persons” may recover remediation costs arises under s 47(3), because recovery from “other responsible persons” (emphasis added) is specified under ss (c):

- (a) costs of preparing a site disclosure statement,
- (b) costs of carrying out a site investigation and preparing a report ...,
- (c) legal and consultant costs associated with seeking contributions from other responsible persons, and
- (d) fees imposed by a director, a municipality, an approving officer or the regulator under this Part. (emphasis added)

Notably, only s 47(3)(c) includes the term “other responsible persons.”

EMA, *supra* para 1, ss 47(3), 47(5).

79 Sullivan explains that the legislature does not speak in vain, which means that the word “other” in s 47(3)(c) must have meaning. However, this must be considered alongside the established principle that “the legislature does not intend to produce absurd consequences” (*Rizzo*). An interpretation may be absurd if it is illogical, incoherent, or conflicts with other provisions of the statute or the statute’s objective.

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at 211.

Rizzo, *supra* para 38 at para 27.

80 If s 47(3)(c) of the *EMA* is interpreted as only allowing persons responsible for remediation to recover their legal costs from other responsible persons, then those who remediate lands while

not falling into the “responsible person” category would be barred from recovering these costs. This interpretation prevents all persons not responsible for remediation under s 48 of the *EMA* from recovering remediation legal costs while allowing those who contributed to the pollution to recover. This is illogical and inconsistent with the *EMA*’s legislative scheme.

EMA, supra para 1, ss 47(3)(c), 48.

81 In addition, an interpretation that prevents innocent persons from recovering remediation legal costs deviates from the *EMA*’s purpose of encouraging timely remediation. Under s 48(1), a director may only issue remediation orders to a “responsible person,” not “any person.” A director cannot compel an innocent person to undertake remediation, so innocent persons are unlikely to undertake remediation if they cannot recover their remediation legal costs through the *EMA*. The Court in *Cordy Environmental Inc v Obsidian Energy Ltd*, 2023 BCSC 1198 (“*Cordy*”) found that a person only needs to have incurred costs to bring an action under s 47 of the *EMA*. This interpretation best aligns with the *EMA*’s purpose of encouraging timely remediation.

EMA, supra para 1 at s 48(1).

Cordy Environmental Inc v Obsidian Energy Ltd, 2023 BCSC 1198 at paras 54—64 [*Cordy*].

82 Interpreting s 47 to allow “all persons” to recover remediation costs aligns with the scheme and goals of the *EMA* and avoids illogical outcomes.

(v) When Seeking Costs, Parties Must Provide Evidence Distinguishing Remediation and Litigation Legal Costs

83 The Respondent agrees with the BCCA and the Appellants that evidence of both reasonably incurred remediation legal costs and litigation legal costs is required in an *EMA* recovery action.

VM BCCA, supra para 15 at paras 14, 144—145.

84 Both VM and Jansen would be able to recover their reasonable remediation legal costs under the *EMA* had they tendered proper evidence to support these claims. However, these costs cannot be recovered in this action due to a lack of evidence.

85 The Appellants seek an order permitting them to present evidence on remediation legal cost at trial. The Appellants do not seek to adduce new evidence at the SEMCC.

86 The BCCA did not err by declining to order the Appellants to provide evidence of their remediation costs when remitting the apportionment issue back to trial. On this appeal, the Respondent submits that the SEMCC can rule on the apportionment issue, which prevents the need to go back to trial.

87 Further, the Appellants' request disregards their previous decision to withhold new evidence when granted the opportunity to adduce it at trial. The BCCA noted that the Appellants did not seek to reopen their case and lead additional evidence when the trial judge explained that the Appellants needed to disclose this evidence to recover their remediation legal costs. The claim to introduce new evidence should also be dismissed because the Appellants have already refused to provide new evidence to support their claim for costs.

VM BCCA, supra para 15 at para 144.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

88 The Respondent requests costs to be awarded against the Appellants in accordance with the SEMCC's Rules.

PART V -- ORDER SOUGHT

89 The Respondent requests that the SEMCC:

- (a) restore *VM BCSC*'s decision on the Benefit Issue, if liability is considered by this Court;
- (b) in the alternative, quash the *VM BCCA*'s decision to remit the apportionment issue back to trial and restore *VM BCSC*'s apportionment decision;
- (c) clarify the scope of remediation legal costs recoverable under the *EMA* outlined by the *VM BCCA* decision; and
- (d) decline to award the Appellant's remediation legal costs due to a lack of evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of January, 2024.



Counsel for the Respondent
Acton Super-Save Gas Stations Ltd.

PART VI -- TABLE OF AUTHORITIES

Legislation	Paragraph No.
<i>Builders Lien Act</i> , SBC 1997, c 45.	73.
<i>Contaminated Sites Regulation</i> , BC Reg 375/96.	1, 40, 43, 44, 59, 69.
<i>Environmental Management Act</i> , SBC 2003, c 53.	1, 26, 39, 47, 58, 64, 65, 69, 73, 78, 80—81.
<i>Small Claims Act</i> , RSBC 1996, c 430.	70.
<i>Strata Property Act</i> , SBC 1998, c 43.	74.
<i>Supreme Court Civil Rules</i> , BC Reg 168/2009.	4, 77.
<i>Waste Management Act</i> , RSBC 1996, c 482.	68.

Case Law	Paragraph No.
<i>Beacon Pacific Properties Ltd v Director, Environmental Management Act</i> , 2022 BCEAB 12.	49.
<i>Canadian National Railway Co v A.B.C. Recycling Ltd</i> , 2006 BCCA 429.	68.
<i>Century Group GP Co Ltd v KRS Excavating Ltd</i> , 2022 BCSC 357.	63, 73, 77.
<i>City of Burnaby v Director, Environmental Management Act</i> , 2018 BCEAB 17.	47.
<i>Cordy Environmental Inc v Obsidian Energy Ltd</i> , 2023 BCSC 1198.	81.
<i>Gehring et al v Chevron Canada Limited et al</i> , 2006 BCSC 1639.	33.
<i>Honing v Phinney</i> , 2018 BCSC 702.	44.
<i>Housen v Nikolaisen</i> , 2002 SCC 33.	35.
<i>Imperial Oil Ltd v Quebec (Minister of the Environment)</i> , 2003 SCC 58.	38.

<i>Jansen Industries 2010 Ltd v Victory Motors (Abbotsford) Ltd</i> , 2019 BCSC 1621.	9—14, 16, 18, 21—26, 34, 43, 48, 54, 56—57.
<i>J.I. Properties Inc v PPG Architectural Coatings Canada Ltd</i> , 2015 BCCA 472.	39, 40, 48—50, 52, 57.
<i>Livco Developments v Dworschak</i> , 2019 BCPC 45.	45, 63, 70.
<i>Rizzo & Rizzo Shoes Ltd (Re)</i> , [1998] 1 SCR 27.	38, 79.
<i>Seabright Holdings Ltd v Imperial Oil Ltd</i> , 2003 BCCA 57.	37.
<i>Seaspan ULC v North Vancouver (District)</i> , 2022 BCCA 433.	51—52.
<i>Tanex Industries Ltd v Greater Vancouver Water District</i> , 2019 BCSC 74.	44.
<i>The Owners, Strata Plan KAS 2428 v Baettig</i> , 1027 BCCA 377.	74.
<i>Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Stations Ltd</i> , 2021 BCCA 129.	15—17, 20, 27— 29, 34, 39, 43, 46, 48, 54, 58, 63, 66—67, 69, 77, 83, 87.
<i>Workshop Holdings v CAE Machinery Ltd</i> , 2003 BCCA 56.	38.

Secondary Sources	Paragraph No.
Priscilla Schwartz, “The polluter-pays principle” in Malgosia Fitzmaurice, David M Ong & Panos Markouris, eds, <i>Research Handbook on International Environmental Law</i> , 2nd ed (Cheltenham: Edward Elgar Publishing, 2010) 243.	38.
Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 6th ed (Markham: LexisNexis Canada, 2014).	79.

PART VII -- LEGISLATION AT ISSUE

Environmental Management Act, SBC 2003, c 53, ss 1, 45-47

Part 1 — Introductory Provisions

Definitions

1 (1) In this Act:

...

"remediation" means action to eliminate, limit, correct, counteract, mitigate or remove any contaminant or the adverse effects on the environment or human health of any contaminant, and includes, but is not limited to, the following:

- (a) preliminary site investigations, detailed site investigations, analysis and interpretation, including tests, sampling, surveys, data evaluation, risk assessment and environmental impact assessment;
- (b) evaluation of alternative methods of remediation;
- (c) preparation of a remediation plan, including a plan for any consequential or associated removal of soil or soil relocation from the site;
- (d) implementation of a remediation plan;
- (e) monitoring, verification and confirmation of whether the remediation complies with the remediation plan, applicable standards and requirements imposed by a director;
- (f) other activities prescribed by the minister;

Part 4 — Contaminated Site Remediation Division 3 — Liability for Remediation

Persons responsible for remediation of contaminated sites

45 (1) Subject to section 46 [*persons not responsible for remediation*], the following persons are responsible for remediation of a contaminated site:

- (a) a current owner or operator of the site;

Persons not responsible for remediation

46 (1) The following persons are not responsible for remediation of a contaminated site:

...

- (d) an owner or operator who establishes that
 - (i) at the time the person became an owner or operator of the site,
 - (A) the site was a contaminated site,
 - (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
 - (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,

- (ii) if the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
- (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

...

- (m) a person who was a responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to
 - (i) change the use of the contaminated site, and
 - (ii) provide additional remediation;

General principles of liability for remediation

47 (1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

(2) Subsection (1) must not be construed as prohibiting the apportionment of a share of liability to one or more responsible persons by the court in an action or proceeding under subsection (5) or by a director in an order under section 48 [*remediation orders*].

(3) For the purpose of this section, "**costs of remediation**" means all costs of remediation and includes, without limitation,

- (a) costs of preparing a site disclosure statement,
- (b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 44 [*determination of contaminated sites*] as to whether or not the site is a contaminated site,
- (c) legal and consultant costs associated with seeking contributions from other responsible persons, and
- (d) fees imposed by a director, a municipality, an approving officer or the regulator under this Part.

...

(5) Subject to section 50 (3) [*minor contributors*], any person, including, but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

(6) Subject to subsections (7) and (8), a person is not required to obtain, as a condition of an action or proceeding under subsection (5) being heard by a court,

- (a) a decision, determination, opinion or apportionment of liability for remediation from a director, or
- (b) an opinion respecting liability from an allocation panel.

...

(9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:

- (a) whether a person is responsible for remediation of a contaminated site;
- (b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;

- (c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;
- (d) such other determinations as are necessary to a fair and just disposition of these matters.

Remediation orders

48 (1) A director may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do any or all of the following:

- (a) undertake remediation;
- (b) contribute, in cash or in kind, towards the costs of another person who has reasonably incurred costs of remediation;
- (c) give security, which may include real and personal property, in the amount and form the director specifies.

Voluntary remediation agreements

51 (1) On the request of a responsible person, including a minor contributor, a director may enter into a voluntary remediation agreement in accordance with the regulations, consisting of

- (a) provisions for financial or other contributions by the responsible person,
- (b) a certification by the responsible person that the person has fully and accurately disclosed all information in the person's possession or control regarding site conditions and the person's activities respecting that site,
- (c) security, which may include real and personal property, in the amount and form, and subject to the conditions the director specifies,
- (d) a schedule of remediation acceptable to the director, and
- (e) requirements that the director considers to be reasonably necessary to achieve remediation.

Approvals in principle and certificates of compliance

53 (3) A director, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if

- (a) the contaminated site has been remediated in accordance with
 - (i) the numerical or risk based standards prescribed for the purposes of the definition of "contaminated site",
 - (ii) any orders under this Act,
 - (iii) any remediation plan approved by the director, and
 - (iv) any requirements imposed by the director,

Independent remediation procedures

54 (1) A responsible person may carry out independent remediation in accordance with the minister's regulations whether or not

- (a) a determination has been made as to whether the site is a contaminated site,
- (b) a remediation order has been issued with respect to the site, or
- (c) a voluntary remediation agreement with respect to the site has been entered into.

Contaminated Sites Regulation, BC Reg 375/96, s 35.

Part 7 — Liability

Determining compensation under section 47 (5) of the Act

35 (1) For the purposes of determining compensation payable under section 47 (5) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.

(2) In an action between 2 or more responsible persons under section 47 (5) of the Act, the following factors must be considered when determining the reasonably incurred costs of remediation:

- (a) the price paid for the property by the person seeking cost recovery;
- (b) the relative due diligence of the responsible persons involved in the action;
- (c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;
- (d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
- (e) any remediation measures implemented and paid for by each of the persons in the action;
- (f) other factors relevant to a fair and just allocation.

(3) For the purpose of section 47 of the Act, any compensation payable by a defendant in an action under section 47 (5) of the Act is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the *Negligence Act*.

Small Claims Act, RSBC 1996, c 430**Costs**

19(4) The Provincial Court must not order that one party in a proceeding under this Act or the rules pay counsel or solicitor's fees to another party to the proceeding.

**VICTORY MOTORS (ABBOTSFORD) LTD. and
JANSEN INDUSTRIES 2010 LTD.**
APPELLANTS

-and-

ACTTON SUPER-SAVE GAS STATIONS LTD.

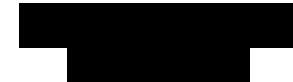
RESPONDENT

S.E.M.C.C. File Number: 02-24-2024

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

**FACTUM OF THE RESPONDENT
ACTTON SUPER-SAVE GAS
STATIONS LTD.**

TEAM # 2024-03



Counsel for the Respondent,
Actton Super-Save Gas Stations Ltd.